93-802

NO. (2)

Supreme Court, U.S.
FILED
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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1993

PAUL ALAN WOTNOSKE,

PETITIONER,

vs.

STATE OF WISCONSIN

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WISCONSIN

APPENDIX TO PETITION

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November 1993

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SUPREME COURT

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You are hereby notified that the Court has

entered the following order:

No.
92-2521-CR State v. Wotnoske L.C. #90CF0340

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner, Paul Alan Wotnoske, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

COURT OF APPEALS
DECISION
DATED AND RELEASED

May 26, 1993

No. 92-2521-CR

STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PAUL ALAN WOTNOSKE,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Waukesha county: KATHRYN W. FOSTER, Judge. Affirmed.

SNYDER, J. Paul Alan Wotnoske appeals from a judgment of conviction for resisting an officer, contrary to sec. 946.41(1), Stats., and from a restitution order that requires him to pay for lost wages and medical expenses of an injured police officer. Because we conclude

that the officers had probable cause and exigent circumstances existed, the officers acted reasonably by entering the Wotnoske property to investigate the unlawful discharge of fireworks; therefore, we affirm the conviction. Also, because the restitution order is sufficiently related to the crime for which Wotnoske was convicted, we affirm the restitution order.

FACTS

On the evening of July 4, 1990, Officer Paul Repischak was investigating an underage party in New Berlin when he heard fireworks being discharged at a nearby property on West Mark Drive. He determined that the fireworks were being discharged at the Wotnoske residence and issued a warning to Paul Wotnoske and others at the residence regarding the city of New Berlin ordinance prohibiting the discharge of fireworks. Repischak was returning to his squad car when he heard additional fireworks

discharging from the area of the Wotnoske residence and saw smoke on the front law of the property. He observed the same group of people he had warned earlier enter the front door of the Wotnoske residence.

Officer Repischak requested assistance, and, while waiting at the front of the Wotnoske residence, he heard fireworks discharging in Wotnoske's backyard. He could not see into the backyard to observe any discharge or smoke at that time. Repischak waited in front of the house until joined by Corporal Streubing and Officer Szcerba. Approximately ten seconds after the last firework discharge, the three officers proceeded around the west side of the Wotnoske residence and into the backyard area. The officers did not have a warrant, nor did they attempt to summon anyone to the front door of the residence before going to the backyard.

Upon entering the backyard, the officers observed Paul Wotnoske sitting on the patio,

observed what they believed to be fireworks residue on the ground, and advised Wotnoske that he would be receiving a summons for violating the fireworks discharge ordinance. Repischak asked Wotnoske for identification, but Wotnoske refused to provide him any. Shortly thereafter, Max and Rennie Wotnoske, Paul's parents and the owners of the residence, came out of the residence, asked what was going on, and told the officers to leave.

After Wotnoske refused to provide his name, he was told that he would be placed under arrest for obstructing an officer if he did not comply. After he became defensive, used profanity, and stated that no one was going to arrest him, Repischak placed him under arrest for obstructing. Wotnoske stated he would kill the first person that tried to arrest him, backed away, and was then forcefully restrained by the three officers. During the altercation, Corporal Streubing suffered injuries, including

a bite to the right thigh, a thumb injury, and a broken rib.

ISSUES

The first issue before the court is the validity of the officers' search of Wotnoske's backyard. Wotnoske contends that his conviction must be reversed because his constitutional rights were violated when the officers unlawfully intruded into his parents' backyard without a warrant. He argues that the backyard and patio were part of the residence curtilage and that the officers did not have consent, probable cause or exigent circumstances to make a warrantless entry. The second issue is the validity of the trial court's restitution order. Wotnoske contends that because the jury acquitted him of the battery to an officer charge, the trial court erred in ordering restitution for the injured officer's lost wages and medical expenses.

RIGHTS VIOLATED

1. Curtilage

The fourth amendment protection to be free from unreasonable searches which attaches to a citizen's home also attaches to the curtilage, the area immediately surrounding and associated with the home. *State v. Walker*, 154 Wis.2d 158, 182, 453 N.W.2d 127, 137, *cert. denied*, 11 S.Ct. 397 (1990). The extent of a home's curtilage is an issue of constitutional fact which we review independently of the trial court's determination. *State v. Moley*, 171 Wis.2d 207, 215, 490 N.W.2d 764, 767 (Ct. App. 1990). However, we will accept the trial court's factual findings unless they are clearly erroneous. Section 805.17(2), Stats.

The trial court denied Wotnoske's motion to suppress and found that: (1) the patio is in very close proximity to the residence; (2) a fence runs on one of the backyard borders; (3) at times individuals use the backyard to cut through to other areas to avoid the busy

traffic on National Avenue; and (4) the backyard could not be observed from the front of the residence and that "it [is] an extremely close question as to whether this area of the defendant's residence is curtilage as defined under the statute, particularly in light of the fact that people do cut through and particularly in light of the fact that although there is a fence, I'm not necessarily satisfied that it rises to the level of being a fenced-in yard."

Wotnoske argues that the backyard and patio are included within a residence enclosure, shielded from public view, reserved only for private activities of the Wotnoske family, and that a reasonable expectation of privacy exists. The state argues that the area is open to view by neighbors, it is not entirely fenced in, it was accessible to the general public because people cut through the subdivision, and questions Wotnoske's standing

to assert the protection because the property was owned by his parents. In addition, relying on *Katz v. United States*, 389 U.S. 347 (1967), and *California v. Greenwood*, 486 U.S. 35 (1988), the state argues that the discharge of fireworks in the backyard was an unlawful activity apparent to the general public such that Wotnoske would foregoing fourth amendment protection.

While the trial court expressed doubt as to whether the "particular backyard of the defendant in this case is [curtilage] subject to Fourth Amendment protection," it ultimately decided the issue of suppression on the basis that the officers had probable cause and acted reasonably. Since we view the probable cause issue to be dispositive, we will assume for the purpose of this case that the area in question is within the protection of the fourth amendment.

2. Probable cause/exigent circumstances

The dispositive issue is whether the officers had probable cause and exigent circumstances to enter the backyard without a warrant. The fourth amendment prohibits police from making a nonconsensual and warrantless entry into a suspect's home to arrest the suspect absent probable cause and exigent circumstances. *See Payton v. New York*, 445 U.S. 573, 589-90 (1980).

Wotnoske contends that the officers did not have consent and that probable cause/ exigent circumstances did not exist which would justify a warrantless search. The state agrees that the officers lacked consent, but argues that the probable cause exigent circumstances standard was met. The state argues that probable cause existed to enter the backyard given that the officers warned Wotnoske of the fireworks ordinance, observed fireworks being discharged from the front of the residence, and

heard firecrackers being discharged in the backyard for approximately one minute before entry.

In reviewing an order regarding suppression of the evidence, a trial court's findings shall be upheld unless they are against the great weight and clear preponderance of the evidence. *States v. Krier*, 165 Wis. 2d 673, 676, 478 N.W.2d 63, 65 (Ct. App. 1991). The trial court made the following findings: (1) an officer had gone to the residence to warn the individuals, including Paul Wotnoske, that he had observed them violating an ordinance; (2) shortly after the officer was leaving, fireworks were again discharged in the front of the residence, which Wotnoske did not deny; and (3) it is undisputed that Wotnoske was the only individual in the backward when the officers arrived in that particular area.

Based upon these findings, the trial court

concluded that probable cause did exist for the officers to proceed to the backyard area of the Wotnoske residence, stating that "under the circumstances and the nature of the violation, one ... susceptible to as much hearing as well as visual observation, that given the proximity of the officer to the residence when his observations were made that this offense was in fact, committed in [his] presence," there was sufficient probable cause. We agree that the officers had probable cause based upon their knowledge and observations made as to a continuing violation of the city of New Berlin fireworks ordinance and that they acted reasonably in proceeding to the area of the infraction to investigate the violation and locate the perpetrator.

Wotnoske argues that exigent circumstances did not exist for the officers to enter the backyard, relying on *Welsh v. Wisconsin*, 466 U.S. 740 (1984). In *Welsh*, a witness observed

a car being driven erratically, which eventually swerved off the road and stopped in an open field. The witness drove behind the car so as to block it from moving and directed another witness to call the police. Before the police arrived, Welsh, the driver, walked away from the scene. When police arrived, the witness informed them that the driver was drunk. After checking the vehicle registration and without securing a warrant, the police proceeded to Welsh's home. When Welsh's stepdaughter answered the door, the police gained entry, proceeded to Welsh's upstairs bedroom, and placed him under arrest. *Id.* at 742-43.

The United States Supreme Court concluded that an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made. *Id.* at 753. "[A]pplication of the exigent-circumstances

exception in the context of home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense, such as the kind at issue in this case, has been committed."[2] *Id.* Wotnoske argues that since the discharge of firecrackers constitutes only a municipal ordinance violation and presents no threat to the community, it is a minor offense that does not warrant police intrusion based on the *Welsh* standard. We disagree.

The facts of this case are easily distinguishable from those in *Welsh*. In *Welsh*, the violation was observed by a witness, not a police officer, and some time passed before the

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[2] Since the first offense of operating a motor vehicle while under the influence of an intoxicant is a civil, not a criminal, offense in Wisconsin, *see* secs. 346.63(1) & 346.65(2), Stats. (1977), the Court concluded that this was a minor violation under Wisconsin law. *Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984).

officers proceeded to Welsh's house. In this case, Officer Repischak personally observed the violation, and even warned Wotnoske and the others present regarding the fireworks ordinance. Within a minute after hearing additional fireworks, the officers proceeded to investigate Wotnoske's backyard.

Wotnoske, after being warned of the ordinance violation, ignored police orders when he moved to the backyard to discharge more fireworks. He now seeks to use his reasonable expectation of privacy under the fourth amendment to avoid enforcement of a law which the community deems important. Given these circumstances, Wotnoske's right of privacy under the fourth amendment to avoid enforcement of a law which the community deems important. Given these circumstances, Wotnoske's right of privacy in his curtilage must yield to the compelling public need to permit effective law enforcement. Accordingly, we conclude that the

officers' actions were reasonable and the entry did not violate Wotnoske's constitutional rights.

RESTITUTION

Wotnoske argues that he should not be ordered to pay restitution to Corporal Streubing because he was not convicted of the battery charge related to the physical altercation with Streubing. He maintains that restitution must be based on a criminal charge that directly relates to the injuries or damages complained of, which in this case is the battery to the police officer charge rather than the resisting an officer charge. The state argues that the restitution statutes, sec. 973.20, Stats., allows the court to require Wotnoske to pay restitution for injuries a victim suffered as a result of a crime which he has committed and out of which

the injuries or damages occurred.[3]

Ordering restitution as a condition of probation is discretionary. *State v. Foley*, 153 Wis. 2d 748, 752, 451 N.W.2d 796, 797 (Ct. App. 1989). We review a discretionary decision to determine whether discretion has been misused. Id. The trial court properly exercises its discretion if it examines the relevant facts, applies a proper standard of law, and using a demonstrated rational process reaches a reasonable conclusion. *Id.* at 748, 451 N.W.2d at 797-98.

The trial court found that while Wotnoske was acquitted of battery to Corporal Streubing, he did inflict bodily harm to Streubing as a "byproduct" of his resisting an officer. The trial court concluded that "the injuries reasonably arose out of the actions of the

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[3] On appeal, Wotnoske does not dispute the injuries, resulting wage loss or medical expenses allegedly suffered by Streubing.

defendant" and therefore considered restitution for Streubing's injuries to be appropriate.

We conclude that the restitution order is consistent with sec. 973.20(3), Stats., which states in part:

> If the crime resulted in bodily injury, the restitution order may require that the defendant do one or more of the following:
>
> (a) Pay an amount equal to the cost of necessary medical ... services ...
>
> ...
>
> (c) Reimburse the injured person for income lost as a result of the crime.

We agree that the injuries were sufficiently related to the crime of conviction, resisting an officer, contrary to sec. 946.41(1), Stats.,

and therefore conclude that the trial court did not misuse its discretion in ordering restitution.

By the Court.--Judgment and order affirmed.

This opinion will not be published. *See* Rule 809.23(1)(b)4, Stats.

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs.

Case Nos. 90-CF-0371
90-CF-0339
90-CF-0340
90-CM-0890
90-CM-0881

RENNIE LORAINE WOTNOSKE,
MARK ANTHONY SAYAS,
PAUL ALAN WOTNOSKE,
BARBARA A. ALBRECHT and
MARK ALAN BUBLITZ,

EXCERPT OF JUDGE'S RULING
FROM PRE-TRIAL SUPPRESSION HEARING

THE COURT: Very well. In assessing the facts and circumstances presented by way of motion and the evidence today in this court's estimation falls under two categories. First of all, whether or not the back yard area where Mr. Paul Wotnoske was located by the officer that evening is therefore curtilage and then protected by the Fourth Amendment and if so, whether or not the officer then had probable cause or exigent circumstances to proceed into that area. The court is satisfied that the law that must apply here is very clear in terms of

the Walker decision and other U.S. Supreme Court decisions cited by the defense. On a factual determination it is not as easy to resolve. Since there is no argument to the contrary or law to the contrary, I am satisfied with the language cited by Mr. Mitchell taken from the earlier decision of U.S. versus Dunn as to factors this court is to take into consideration, whether or not this area in question in the matter is in fact, curtilage and in essence as defined under that case. It is clear in this matter that the patio that Mr. Wotnoske was seated on is very close proximity to the residence itself. I don't recall any specific distance measured or testified to by the parties, but the court can make its own observation referring specifically to Exhibit 2B and 2C which clearly depicts that area. Also depicted in that area is the fact that there is a fence as described in the evidence today that runs on one of the borders of the back yard. According to 2F it is a distance

from about the rear of the residence itself until almost the back of the back yard boundary. However, on the north boundary of the residence as well as on the west side of the residence, there is no such fence. The testimony in this area, however, also includes a reference by Mr. Wotnoske, Paul Wotnoske himself, that at times individuals use the back yard to cut through going to other areas to avoid the busy traffic on National Avenue, which according to Exhibit 1F is relatively nearby. So, despite the testimony of Max Wotnoske, even though not invited, it appears that other members of the public have been known to use that yard to cut through in passing through the area. What is also established by the record today and in essence not contested by the State based Officer Repischak's testimony is that standing in the front of the residence on the date in question, he was not able to observe the back yard and therefore, observe who may or may not have set

off the fireworks that he describes hearing at this particular time. Under all the circumstances, the court finds it an extremely close question as to whether this area of the defendant's residence is curtilage as defined under the statute, particularly in light of the fact that people do cut through and particularly in light of the fact that although there is a fence, I'm not necessarily satisfied that it rises to the level of being a fenced-in yard. The Walker case cited by the defense in support of its motion makes reference to the fact that it was a fenced-in back yard. In that particular case, with little description. I do note that that case also was reversed on other grounds based on the nature of the jury selection and remanded, but I perceive to be instructions to the trial court in that case to make further inquiry as to whether or not there was probable cause and exigency. There apparently was enough information on the facts of the case for the Walker court to decide that

there was Fourth Amendment protection but the second phase of the decision was yet to be made. Even though the court is not persuaded that this particular back yard of the defendant in this case is subject to Fourth Amendment protection, on the issue or probable cause. I find a much less closer case. The testimony of the officer in the case is that he had gone to the residence first to warn the individuals of his observation believing that an ordinance violation had, in fact, occurred after he stood and listened apparently nearby. The officer apparently was not asked to leave on that particular occasion and he did not decide to take any formal police action. The officer describes that he had contact in his estimation with the defendant Paul Wotnoske, contact that Mr. Wotnoske denies in testifying himself which in this court's estimation is ultimately not dispositive of the issue. What is dispositive to a certain extent is that very shortly after the officer was leaving, fireworks were again

discharged in the front of the residence. Discharge of fireworks that the defendant Paul Wotnoske himself does not deny. What is denied, however, is whether or not fireworks were subsequently discharged in the back yard as well while Officer Repischak waited for back-up to return to the area. The court does not per se, find the testimony of Max Wotnoske helpful in resolving that issue since he says there was fireworks going on all the time in the neighborhood and he himself, does not recall the fireworks discharged in the front of the residence which Paul Wotnoske admits to. So the recollection on that subject seems very cloudy at best. So you in essence have the defendant Paul Wotnoske's word against that of the officer, but what is not disputed is the fact that Paul Wotnoske was the only individual in the back yard when the officer arrived in that particular area. If this was a trial, perhaps the court would dwell longer on whether or not that was the case. This is not, and

what the State must establish is probable cause. I think under the circumstances stated here, the officer did have probable cause. Whether the discharge of fireworks themselves gives rise to exigent circumstances. I am not going to decide since the exceptions are in the disjunctive. It is either one or the other. And under the findings of this court, that again, there was probable cause to believe in this case that an ordinance was being violated, that the officer at this point had the authority to step onto the Wotnoske property. As far as for--as far as defense counsel's argument and I apologize because I have not recently read the Welch decision and Justice Abrahamson's dissent. I hazard a guess the observation of the presence of the officer is not contained in that decision or perhaps in any other. I would surmise, however, that under the circumstances and the nature of the violation, one that susceptible to as much hearing as well as visual observation, that

given the proximity of the officer to the residence when his observations were made that this offense was in fact, committee in the presence as envisioned by that particular statutory language. Therefore, based on all the evidence presented at this proceeding and in reviewing the applicable case law, the court is satisfied that although a warrantless entry was made by the officer, that it was within their authority and not violative of the defendant's Fourth Amendment Constitutional rights. The court therefore, will deny the motion as pertains to both defendants Paul and Rennie Wotnoske and subsequent evidence or testimony of officers is not to be suppressed in any fashion. I believe then we have a second motion that pertains only to the defendant Mark Sayas.

MR. MITCHELL: Your Honor, just one brief comment during the court's ruling. Mrs. Wotnoske and Paul indicated that they thought that you had misunderstood his testimony with

regard to people going through the yard. He didn't say they went through their yard. He said they went through a neighbor's yard to get access and while his initial statement was people, sometimes cut through the yard, he then clarified and said he meant the neighbor's yard, not his own yard, but I don't think that would change Your Honor's ruling.

THE COURT: No, it does not and I appreciate that clarification if I misunderstood. Thank you, Mr. Mitchell.

MR. MITCHELL: During the next portion, could we either be excused or sit in the back of the courtroom?

THE COURT: Certainly, in fact I'm going to go off the record.

STATE OF WISCONSIN : CIRCUIT COURT : WAUKESHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

vs. Case No. 90-CF-0340

PAUL ALAN WOTNOSKE,

Defendant.

EXCERPT OF JUDGE'S RULING
FROM MOTION FOR POST-CONVICTION RELIEF

THE COURT: All right, the Court in addressing the motion of the defense would in essence go to perhaps what I believe to be the threshold argument and that is whether or not the actions of the officer; that is, going on the curtilage of the residence was somehow violative of defendant's constitutional rights and therefore making everything that happened afterwards suppressible as was correctly stated by Ms. Guziel subject of pretrial matters as well as argument and motion during the trial. Nothing that the Court has heard today

convinced me that decision of the Court previously entered and denying such motions is contrary to law. There is no requirement that there has to be eye-ball to eye-ball observation of someone discharging fireworks. In this case it was a "circumstantial" situation; there was smoke seen coming from the backyard of the area and the officer arriving in that area of the residence to investigate. Defendant was the only individual present and for purposes of probable cause and issuance of a citation the Court estimates that was sufficient. Because of the Court's ruling and that the officer was not outside the scope of his authority for entering the curtilage to make that observation to issue that citation that what happened next was to be a thing of -- subject of great controversy at the time of the trial and resolved contrary to the defendant's position of no guilt or responsibility. The Court would interpret the evidence ultimately to be overwhelming in terms of behavior of the

defendant as being resistive of the actions of the officer on the scene. Whether not there is case law indicating that an individual does not have to identify themselves at the State level as cited by the defense and I believe there is also a U.S. Supreme Court decision along those lines, what cannot be ignored is this was not a situation where the officer went in the backyard and randomly asked Mr. Wotnoske for his identification. Instead the identification was being sought as a means to issue a citation to Mr. Wotnoske. And that clearly is within an officer's official capacity and lawful authority in attempt to determine identification for that purpose. If there had been no other purpose perhaps case law cited for -- on behalf of the defense would be applicable to this fact situation. But in this Court's opinion that circumstance clearly differentiates this case from others cited by defense counsel today and at previous motion matters. . . .

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

UNITED STATES CONSTITUTION

AMENDMENT ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or

immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.